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OUR FILE NO.
0594-101-63

August 18, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

The law firm of Haley Bader & Potts P.L.C. hereby submits the original and fourteen copies of the enclosed Petition for Rule Making. The petition asks the Commission to initiate a rule making to review, and as necessary revise, its rules and policies with respect to Equal Employment Opportunity.

Respectfully submitted,



John Crigler

JC:dh
Enclosure

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ORIGINAL

Before The
Federal Communications Commission
Washington, D.C. 20554

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AUG 18 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter Of)

Re-examination of the FCC's)
Equal Employment Opportunity)
Program)

RM Docket No. _____

TO: The Commission)

DOCKET FILE COPY ORIGINAL

PETITION FOR RULE MAKING

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August 18, 1995

SUMMARY

For the past quarter century, the FCC has maintained an EEO program which rests on the predictive judgment that EEO requirements in addition to those imposed by other state and federal law are necessary to increase “diversity” of programming in the broadcast medium. That hypothesis remains untested. The Commission has not defined the goal of “diversity” with any precision, nor established any criteria for determining when diversity is achieved -- either by an individual broadcaster or the broadcast industry as a whole.

Diversity can no longer serve as a talisman. The *Adarand* decision now requires the Commission to undertake a searching examination of its EEO program, to substantiate the presumed relationship between employment practices and programming, and to determine whether the EEO requirements are narrowly tailored to achieve a compelling goal.

Haley Bader & Potts therefore urges the Commission to initiate a rule making as expeditiously as possible

Before The
Federal Communications Commission

Washington, D.C. 20554

In The Matter Of)	
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Re-examination of the FCC's)	RM Docket No. _____
Equal Employment Opportunity)	
Program)	
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TO: The Commission		

PETITION FOR RULE MAKING

The law firm of Haley Bader & Potts P.L.C. hereby petitions the Federal Communications Commission to initiate a rule making to review and, as necessary, revise or rescind its rules, procedures, policies, and guidelines for promoting equality of employment opportunity in the broadcast industry (collectively, its "EEO program") in light of the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Pena*, U.S. ____, 63 LW 4523 (June 12, 1995). As discussed below, *Adarand* establishes a new constitutional standard with which all federal classifications systems based on race or ethnic characteristics must comply. The FCC's EEO program has never been evaluated by these criteria.

INTRODUCTION

The need for FCC action is urgent. On July 19, 1995, President Clinton released an Affirmative Action Review that canvassed federal affirmative action programs. The Affirmative Action Review takes *Adarand* into account only to note that "Several of our conclusions and recommendations . . . must be considered tentative and provisional because the intervening Supreme Court decision in *Adarand*

Constructors, Inc. v. Pena now requires that many such judgments be based on the much more detailed empirical analysis entailed by the constitutional standard of 'strict scrutiny.'" Affirmative Action Review, Foreword. The Affirmative Action Review is further qualified by the fact that its survey of FCC preferences and policies is limited to those designed to increase minority *ownership* of communications enterprises. The Affirmative Action Review does not consider the FCC's EEO program with respect to employment practices. As a result, the Affirmative Action Review raises broad questions about the continuing validity of the FCC's EEO program, but provides none of the "empirical analysis" needed to resolve those questions.

Such questions are more sharply raised in the June 28, 1995 Memorandum of the Department of Justice to the General Counsels of federal regulatory agencies ("DOJ Memo"), which concludes that: "*Adarand* makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decision making to determine if they comport with the strict scrutiny standard." DOJ Memo, p. 34. The DOJ Memo offers an analytic framework that is incorporated in Part III of this Petition.

As both the Affirmative Action Review and DOJ Memo make clear, *Adarand* requires the FCC to re-examine its EEO program under new, exacting criteria. The need for such an examination is made even more urgent by the advent of the renewal cycle for broadcast licenses. The seven-year renewal period for radio stations will begin to expire in October, 1995. See 47 C.F.R. § 73.1020. Petitions to Deny such

applications will be due by September 1, 1995.¹ The continuing validity of the FCC's EEO program will thus soon become a critical issue with respect to scores of license renewal applications likely to be challenged on grounds of inadequate EEO performance.

In order to assure that the EEO requirements being applied to broadcast licensees meet the stringent criteria established by *Adarand*, Haley Bader and Potts urges the Commission to undertake a prompt, thorough review of its EEO program, to invite comments on alternatives to present requirements, and to make necessary changes expeditiously.

I. THE ADARAND DECISION

In *Adarand*, a nonminority firm challenged the constitutionality of a Department of Transportation ("DOT") program that compensated prime government contractors who hired subcontractors controlled by "socially disadvantaged" individuals. The principal question considered was the constitutional standard of scrutiny appropriate for federal programs based upon racial or ethnic classifications. The Court held that federal affirmative action programs were subject to "strict" rather than "intermediate" level scrutiny. In order to satisfy such scrutiny, the classification must address a "compelling interest" and be "narrowly tailored" to serve that interest. 63 USLW at 4530.²

¹ Petitions to Deny the license renewal applications of 11 radio stations in the Norfolk, Virginia area have, in fact, already been filed. See *Communications Daily*, p.5 (August 16, 1995).

² By contrast, an "intermediate level of scrutiny requires only that the classification serve an "important" governmental interest and be "substantially related" to the achievement of that objective. See *Metro Broadcasting*, 497 U.S. 547, 564-565 (1990).

In reviewing the line of cases that construe the Equal Protection component of the Fifth Amendment's Due Process clause, the Court invalidated *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), which had applied an "intermediate" level of scrutiny in upholding the comparative preference given to minority applicants for broadcast frequencies. *Metro* was overruled to the extent that it was inconsistent with *Adarand's* holding that "all racial classifications, imposed by whatever federal, state, or local governmental factors, must be analyzed by a reviewing court under strict scrutiny." *Id.* Any EEO program now enforced by the FCC must thus be narrowly tailored to advance a compelling governmental interest.

II. A BRIEF HISTORY OF THE FCC'S EEO PROGRAM

The FCC's EEO policy grew out of the "racial crisis," *Memorandum Opinion and Order and Notice of Proposed Rule Making*, 13 FCC2d 766 (1968), of the 1960s and the "national policy," 13 FCC 2d at 767, articulated in the Civil Rights Act of 1964. On July 3, 1968, the Commission responded to a request that the Commission adopt a rule prohibiting discrimination in employment by broadcast licensees and requiring that: "Evidence of compliance with this section be furnished with each application for a license and annually during the term of each license upon prescribed forms." 13 FCC 2d at 766.

In the *Memorandum Opinion and Order* portion of its ruling, the Commission noted that, pursuant to Sections 307(a), (d) and 309(a) of the Communications Act, it could grant an application for an FCC authorization only after finding that the "public interest, convenience and

necessity would be served.” 13 FCC2d at 768. Thus, even without a rule that specified EEO duties, “a petition or complaint raising substantial issues of fact concerning discrimination in employment practices calls for full exploration by the Commission before the grant of the broadcast application before it.” 13 FCC2d at 774.

The Commission expressed doubts as to “whether submission of a showing in this respect by every licensee is any more required than, for example, a showing that the licensee has complied with the Fairness Policy, also a requirement for renewal.” 13 FCC 2d at 771. Rather than propose affirmative action requirements, the Commission announced procedures for considering complaints of discriminatory employment practices as grounds for denying a broadcast renewal application.

The related Notice of Proposed Rule Making proposed rules limited to providing those believing they had been victims of discriminatory practices with notice of the right to complain to the EEOC. See 13 FCC 2d at 773.

In the concluding portion of the document, the Commission called for “a commitment going beyond the letter of the policy and attuned to its spirit and the demands of the times.” 13 FCC 775. This commitment related not to employment practices, but to the portrayal of minorities in programming:

This is not a matter on which the Commission can appropriately intervene. The judgment as to whether to use one performer or another or a particular script approach in a particular program is wisely beyond the jurisdiction of the Commission. Rather, all we do is again raise the question in context of the conscience of the broadcaster at this juncture of our national affairs. 13 FCC2d at 775.

The Commission expressly disavowed any goal of redressing the effect of past discrimination:

We stress that we are not condemning the broadcast media for past actions or neglect. It is fruitless to focus on the past. Nor are we implying that broadcasters or others are not presently engaged in meeting the challenges set out in the [Report of the National Advisory Commission on Civil Disorders]. The thrust of our message is that the nation requires a maximum effort in this vital undertaking and to call upon all broadcasters to make as great a contribution as they can.

13 FCC 2d at 775.

By 1969, the Commission had decided that a rule was a desirable means of demonstrating compliance with its nondiscrimination policy. *Report and Order*, 18 FCC 2d 240 (1969). The Commission concluded that an affirmative action program would “complement, not conflict with, action by bodies specially created to enforce the policy,” 18 FCC2d at 243, and that such a program was preferable to a regulatory scheme based upon actual complaints of discrimination. A system based upon individual complaints would be time consuming to administer, would place a heavy burden on individuals to prove the existence of discrimination and would fail to “cope with general patterns of discrimination developed out of indifference as much as out of outright bias.” 18 FCC at 242. The Commission therefore proposed detailed requirements for an affirmative action program based upon EEO requirements imposed on for government agencies.

Each station with five or more fulltime employees would be required to submit an Annual Employment Report that provided an

employment profile of the station, and would be required to devise an affirmative action plan that would “assure equal employment in every aspect of station employment practice, including training, hiring, promotion, pay scales, and work assignments.” 18 FCC 2d at 244. The plan would “vary with the size of the station and the nature of the community.” *Id.* Further comments were invited on specific requirements.

In May, 1970, the FCC adopted rules similar to those proposed after rejecting arguments that it was “inappropriate for the Commission to act in this area, and particularly to go beyond the 25-employee cut off point adopted by Congress in the Civil Rights Act of 1964.” *Report and Order*, 23 FCC 2d 430 (1970). The rules adopted required the filing of Annual Employment Reports and the submission of an EEO plan as part of an application for a construction permit, the assignment or transfer of a license or construction permit, and a ten-point EEO Report with the application to review a broadcast license.

In 1976, the FCC revisited its EEO program requirements, reaffirmed its commitment to “affirmative action” (as opposed to mere avoidance of discrimination) and asserted that “‘employment neutrality’ was insufficient to correct the problem of underutilization of minorities and women. . . .” *Report and Order*, 60 FCC 2d 226, 228 (1976). In place of an individualized EEO plan, the Commission prescribed a model EEO plan to be followed by all stations with ten or more fulltime employees.³

³ The revision of the rule to exempt stations with 10 (rather than 5) or fewer employees was struck down on grounds that the FCC had insufficiently articulated its rationale

The employment profile at each such station would be examined to determine whether there was a “reasonable representation” of women and minorities, based upon their availability in the workforce. Although the Commission initially refused to define a “zone of reasonableness” in quantitative terms, it subsequently established “EEO processing guidelines”⁴ for reviewing renewal applications of stations that failed to meet quantitative standards.

Drawing upon language from a note in *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 n7 (1975), the FCC found that “our regulations concerning discrimination by broadcasters can be justified insofar as they are “necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees’ programming fairly reflects the tastes and viewpoints of minority groups.” 60 FCC 2d at 229. Deliberate discrimination in employment was found to be “inconsistent with the responsibility of each broadcaster to make a *bona fide* effort to ascertain and serve all elements of its community.” *Id.* The Commission’s role was “that of assuring on an overall basis that stations are engaging in employment practices which are compatible with

for changing the exemption threshold. See *United Church of Christ v. FCC*, 560 F.2d 529 (2nd Cir. 1977).

⁴ See *EEO Processing Guidelines*, 46 RR2d 1693 (1980). Under the Guidelines, stations with 5 to 10 full-time employees would have their renewal applications subjected to heightened scrutiny if minority groups and/or women were not employed at a ratio of 50% of their workforce availability and 25% in the upper-four Form 395 job categories (officials and managers, professionals, technicians and sales); and stations with 11 or more full-time employees would have their renewal applications scrutinized if minority groups and/or women were not employed at a ratio of 50% of their availability in the workforce overall and 50% in top-four job categories. All renewal applications of stations with 50 or more full-time employees would be subject to review; and stations with five or fewer employees would be exempt from the requirement of having a written EEO program.

their responsibilities in the field of public service programming.” Id. at 230.

In 1987, the Commission adopted what came to be called the “efforts” test of compliance with EEO requirements. Under this test, a licensee’s EEO performance was subjected to a two-step procedure. “The first step will be to make an initial evaluation of a station’s effort’s based on the full range of information available concerning its EEO record.” 2 FCC Rcd 3974. This record included the broadcaster’s EEO program, EEO complaints filed against the station, the composition of the station’s workforce as submitted on its Annual Employment Reports, and the composition of the workforce in the station’s area. If the initial evaluation indicated that a station’s efforts fell outside a “zone of reasonableness,” the station would be subjected to a second-step investigation of those areas of responsibility where its efforts are deficient. 2 FCC Rcd 3974. Prior “quantitative tests” of EEO performance were rejected to the extent they constituted “safe harbors.” Id.

In February 1989, the Commission issued a *Memorandum Opinion and Order* clarifying the procedures to be followed in completing the Equal Employment Opportunity Program Report (FCC Form 396) submitted with an application for license renewal. The *Memorandum Opinion and Order* focused on the requirements for documenting “applicant flow,” 4 FCC Rcd 1715.

Specifically, we have asked licensees for a list of those hired as well as those who applied for each job filled during a particular period of time, identifying each applicant by referral source, sex, and race or national origin. When applicant flow data were not kept by a licensee or when a licensee could not determine whether its efforts

resulted in any minority or female referrals, we held the program deficient.

4 FCC Rcd at 1715.

The Commission left no doubt that broadcasters were required to identify all job referrals by race and gender: “[W]e do not see how a licensee, or the Commission, could possibly assess, as required, whether a sufficient number of qualified women and minorities were applying for available positions, if the licensee had no idea as to how many, if any, women and minorities were applying for such positions.” 4 FCC Rcd at 1716.

Two pending proceedings involve the FCC’s EEO program. In February 1994, the Commission released a *Policy Statement*, 9 FCC Rcd 929(1994) which established detailed guidelines for assessing forfeitures for EEO violations. These guidelines were based principally upon a licensee’s “failure to recruit so as to attract” minority and female applicants for job openings. See 9 FCC Rcd at 933-936. The *Policy Statement* reaffirmed the Commission’s “bedrock goal” as “safeguarding the public’s right to receive a diversity of views and information over the public airwaves.” 9 FCC Rcd at 929. *citing Metro*. Various parties have sought reconsideration of the *Policy Statement*.⁵

In April 1994, the Commission issued a *Notice of Inquiry* which reaffirmed that the “overriding goal of our EEO rules” is the promotion of “program diversity.” 9 FCC Rcd 2047 (1994). As part of this inquiry, the Commission invited comment on such questions as how small market

⁵ In light of the decision in *United States Telephone Ass’n v. FCC*, 28 F.2d 1232 (D.C. Cir. 1994), the proposed forfeiture structure has not been put into effect. See *GAF Broadcasting Company, Inc.*, FCC 95-271 (July 21, 1995).

broadcasters could better attract and retain minority employees and whether there were ways to “decrease any administrative burdens placed on broadcasters . . . without decreasing the effectiveness of our broadcast EEO enforcement” *Id.* at 2051. Comments were submitted more than a year ago, but no subsequent action has been taken.

III. AUTHORITY

The FCC bases its authority to impose EEO requirements on its general duty to assure that the recipients of broadcast authorizations serve the “public interest, convenience and necessity.” See 47 U.S.C. 307, 309. The Commission has not been expressly charged by Congress with the duty of creating an EEO program for the broadcast industry.⁶

The Second Circuit has found that

EEO enforcement is not the FCC’s mission. Thus, it has no obligation to promulgate EEO regulations. But it does possess the power to issue such regulations in furtherance of its statutory mandate to ensure that broadcasters serve all segments of the community. See *NAACP V. FPC*, 925 U.S. 662, 670 n.7 (1976).

560 F. 2d at 531.

⁶ As part of the Cable Television and Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) Congress prohibited the FCC from revising the EEO regulations in effect on September 1, 1992, as such regulations applied to television licensees and directed the Commission to conduct a midterm review of the employment practices of TV licensees.

IV. PURPOSE

The purpose of the FCC's EEO program was initially conceived to be the prevention of discriminatory employment practices against minority applicants. See 13 FCC 2d at 769-770. Any attempt to affect programming was considered "wisely beyond the jurisdiction of the Commission," 13 FCC 2d 775, and a matter for the "conscience" of the broadcaster. *Id.* Over time, and particularly since 1976, the Commission has embraced the rationale that its EEO program is designed "to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *Report and Order*, 60 FCC2d at 229.⁷ The diversity rationale is grounded in dicta from *NAACP v. FCC*, and *Metro*. In light of the fact that *Adarand* specifically overrules the standard of review adopted in *Metro*, the Commission must now carefully re-examine the purpose which its EEO requirements is intended to further.

Although the Commission has historically disavowed any claim that its EEO program serves a remedial purpose, *Adarand* makes clear that there must be a factual predicate even for nonremedial programs. "Diversity" is not an end in itself, but a means to a larger goal.

Adarand does not directly address whether and to what extent nonremedial objectives for affirmative action may constitute a compelling governmental interest. At a minimum, to the extent

⁷ "We do not contend that this agency has a sweeping mandate to further the 'national policy' against discrimination, nor have we sought to duplicate the detailed regulatory efforts of specialized agencies such as the EEOC. Instead we have sought to limit our role to that of assuring on an overall basis that stations are engaging in employment practices which are compatible with their responsibilities in the field of public service programming." *Report and Order*, 60 FCC 2d at 230 (footnote omitted). But see, *Notice of Inquiry*, where the Commission claims that its EEO rules "enhance access by minorities and women to increased employment opportunities which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership."

that an agency administers a nonremedial program intended to promote diversity, the factual predicate must show that greater diversity would foster some larger societal goal beyond diversity for diversity's sake. The level and precision of empirical evidence supporting that nexus may vary, depending on the nature and purpose of a nonremedial program. For a nonremedial program, the source, type, scope, authorship and timing of underlying findings should be assessed, just as for remedial programs.

DOJ Memo, p. 36.

If the Commission reaffirms the view that its EEO program rests upon a compelling duty to increase "diversity" of programming, the nexus between the Commission's EEO requirements and programming transmitted by broadcast media must be supported by facts available to the Commission or solicited through a rule making process. Such a factual predicate must substantiate the premise that broadcast programming is not currently diversified and that competitive market forces are insufficient to remedy the defect.

V. NARROW TAILORING

Under the strict scrutiny required by *Adarand*, governmental classification systems based on race must not only advance a "compelling" governmental interest, but must be "narrowly tailored" to achieve that purpose. As set forth in the DOJ Memo, the factors that typically make up the "narrow tailoring" test are: (1) whether the government considered race-neutral alternatives before resorting to race-conscious action; (2) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; (3) whether race is a factor in determining eligibility for a program or just one factor in the decisionmaking process; (4) the

comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (5) the duration of the program and whether it is subject to periodic review; and (6) the degree and type of burden caused by the program. Each of these factors is briefly taken up below.

1. Race-Neutral Alternatives

From the beginning, the Commission's EEO program has relied explicitly upon racial and ethnic categories. The Commission has not explored the possibility that effective, race-neutral alternatives to achieving program diversity may exist.

As the D.C. Circuit had occasion to remind the Commission in *Lamprecht v. FCC*, 958 F.2d 328, 398 (D.C. 1992), predictive judgments based upon the connection between ownership of an interest in a broadcast station and the programming carried by that station are fraught with hazards. Even under the "intermediate" level of scrutiny sanctioned by *Metro*, the *Lamprecht* court found that the government had failed to show that its policy of granting a comparative preference to female applicants was substantially related to achieving diversity on the airwaves. 958 F.2d at 398. The Commission now faces the daunting task of substantiating a connection not between the ownership of broadcast media and the programming broadcast, but between levels of minority or female employment and types of programming broadcast. Such a nexus must be based upon empirical analysis rather than on intuition, lest the Commission perpetuate the very stereotypes it is attempting to undermine. See *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Predictive judgments concerning group

behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence. *Lamprecht, supra*, 958 F.2d at 393.

Comments on alternatives to race-based methods of achieving program diversity are obviously required.

2. Scope of Program

The FCC's EEO Program affects all broadcast licensees.⁸ The EEO program is currently designed to achieve not a discrete, time-limited purpose, but an indeterminate, indefinite purpose of increasing "diversity" of programming.

If the Commission reaffirms diversity of programming as the basis of its EEO program, it must examine the question of whether less intrusive, more narrowly tailored means of addressing such diversification are available. If the Commission instead reverts to the rationale that an EEO program is needed to prevent discriminatory employment practices, it must demonstrate the "compelling need" for a program that would, as it has recognized,⁹ duplicate other federal employment programs, such as that imposed by the EEOC.

Although the Commission has from time to time collected data that indicate "improvement in the EEO profile of the broadcast industry generally," *Notice of Inquiry*, para 15, it has not attempted to demonstrate that increased levels of minority and female employment are attributable

⁸ Licensees are excused from the duty of preparing a written EEO plan if they employ fewer than five full-time employees or serve areas with a minority population of less than 5 percent. Licensees are always required to have an EEO program with respect to women. See *EEO Guidelines*, 46 RR2d at 1693-1694.

⁹ See *Report and Order*, 60 FCC2d at 230.

to its EEO requirements, rather than broad societal changes, nor has it noted evidence of “what might result if the racial classification were discontinued.” DOJ Memo, p. 37. Comments on this question are warranted.

3. Manner in which Race is Used

Race and ethnic background are facial elements of the FCC’s EEO program. The FCC requires broadcast licensees to collect detailed information about the race and gender of all job applicants who make up the referral pool, the applicant pool and the interview pool for both part-time and full-time positions, and, upon request, to provide this information to the Commission for at least the three-year period preceding the filing of the renewal application, and potentially for the entire license term. See *Notice of Inquiry; Memorandum Opinion and Order*, 4 FCC Rcd at 1716 (1989). Broadcasters are also required to document their efforts to contact minority-specific referral sources and to advertise job opportunities in minority specific publications.¹⁰

The Commission has not evaluated the effectiveness of these requirements. If the Commission’s concern is that a broadcaster give notice of job opportunities to “all elements of its community,” *Report and Order*, 60 FCC2d at 229, could this concern be addressed simply by requiring notice requirements in publications of general circulation such as those detailed in 47 C.F.R. § 73.3580?

¹⁰ The Commission has recently based a \$30,000 forfeiture on the proposition that its recruitment procedures and record keeping procedures are more important than minority hiring results. See *GAF Broadcasting Co., Inc.*, *supra*.

4. Comparison of Numerical Target to Relevant Market

Although the Commission has abandoned quantitative standards as a “safe harbor” for broadcasters seeking to prove that their EEO “efforts” are adequate, the Commission continues to use quantitative criteria in evaluating broadcast renewal applications and assessing forfeitures for violation of its EEO rules. See, e.g., *Holiday Broadcasting*, FCC 95-153 (April 27, 1995). Because the Commission’s EEO program is intended to serve a non-remedial, programming purpose rather than a remedial, employment purpose, it is questionable whether statistical evidence related solely to employment practices is meaningful.

If diversity broadcast programming is the goal, the success or failure of the Commission’s EEO program can be determined only by analyzing the *nexus* between employment practices and programming. The Commission should invite comments on the question of whether such a nexus exists.

5. Duration and Periodic Review

Any affirmative action program must be viewed as a temporary exception to “the norm of equal treatment of all racial and ethnic groups,” *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510 (1989). The DOJ Memo interprets this requirement to mean that “a racial or ethnic classification is more likely to pass the narrow tailoring test if it has a definite end-date, or is subject to meaningful periodic review that enables the government to ascertain the continued need for the measure.” DOJ Memo, pp. 26-27.

After conducting an exhaustive study of the development of the communications industry, *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC2d 145 (1985), the Commission concluded that government regulation was no longer necessary "to ensure the availability of information and new points to the public." *Syracuse Peace Council*, 2 FCC Rcd. 5043, 5051 (1987), *affirmed on nonconstitutional grounds*, 867 F.2d 654 (D.C. Cir. 1989). Both past and prospective growth in the number and types of information outlets since 1969¹¹ negated the need for governmental intervention and ensured the existence of a multiplicity of voices in the marketplace. *Syracuse Peace Council*, 2 FCC Rcd at 5050-5052. The Commission should invite comment as to whether the explosion of information outlets has rendered the FCC's EEO program as unnecessary as the now abandoned Fairness Doctrine.

The FCC's current EEO program is indefinite in duration and not subject to periodic review. The Commission should invite comment on methods of objectively evaluating the success or failure of its policy and on periodically applying that evaluation method to its EEO program.

6. *Burden*

The Commission has "moved with steadily increasing actions to strengthen our rules and policies in the area of nondiscrimination in the employment policies and practices of broadcast station licensees."

Report and Order, 60 FCC 2d at 229. It now subjects every aspect of a

¹¹ The year of the Supreme Court's decision upholding the constitutionality of the Fairness Doctrine in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) and coincidentally the year in which the FCC proposed the creation of an EEO program.

broadcast licensee's "efforts" to recruit minority and women candidates to exacting scrutiny. The issue is not, however, whether nondiscrimination is a worthy goal -- the Commission has disclaimed such a "sweeping mandate," *Report and Order*, 60 FCC 2d at 229 -- but whether the heavy burden imposed on broadcasters results in any measurable gain in the "field of public service broadcasting." *Id.* at 230.

7. Pool of Beneficiaries

The Commission has not attempted to determine whether its EEO program actually achieves the goal of assuring that "programming fairly reflects the tastes and viewpoints of minority groups." *Report and Order*, 60 FCC2d at 229. To the extent that the Commission intends specific minority groups to receive programming which reflects their unique "tastes and viewpoints," its goal is fraught with the dangers of stereotyping against which the *Lamprecht* court warns. See 958 F.2d at 392-395.

Comments are warranted on the question of assessing how either the general public or particular minority groups derive program-related benefits from the FCC's EEO program.

CONCLUSION

For the past quarter century, the FCC has maintained an EEO program which rests on the predictive judgment that EEO requirements in addition to those imposed by other state and federal law are necessary to increase "diversity" of programming in the broadcast medium. That

hypothesis remains untested. The Commission has not defined the goal of "diversity" with any precision, nor established any criteria for determining when diversity is achieved -- either by an individual broadcaster or the broadcast industry as a whole.

Diversity can no longer serve as a talisman. The *Adarand* decision now requires the Commission to undertake a searching examination of its EEO program, to substantiate the presumed relationship between employment practices and programming, and to determine whether the EEO requirements are narrowly tailored to achieve a compelling goal.

Haley Bader & Potts therefore urges the Commission to initiate a rule making as expeditiously as possible.

Respectfully submitted,

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John Crigler

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August 18, 1995

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley Bader & Potts P.L.C., hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

Chairman Reed E. Hundt *
Federal Communications Commission
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Washington, D.C. 20554

Commissioner James H. Quello *
Federal Communications Commission
Mass Media Bureau
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August 18, 1995